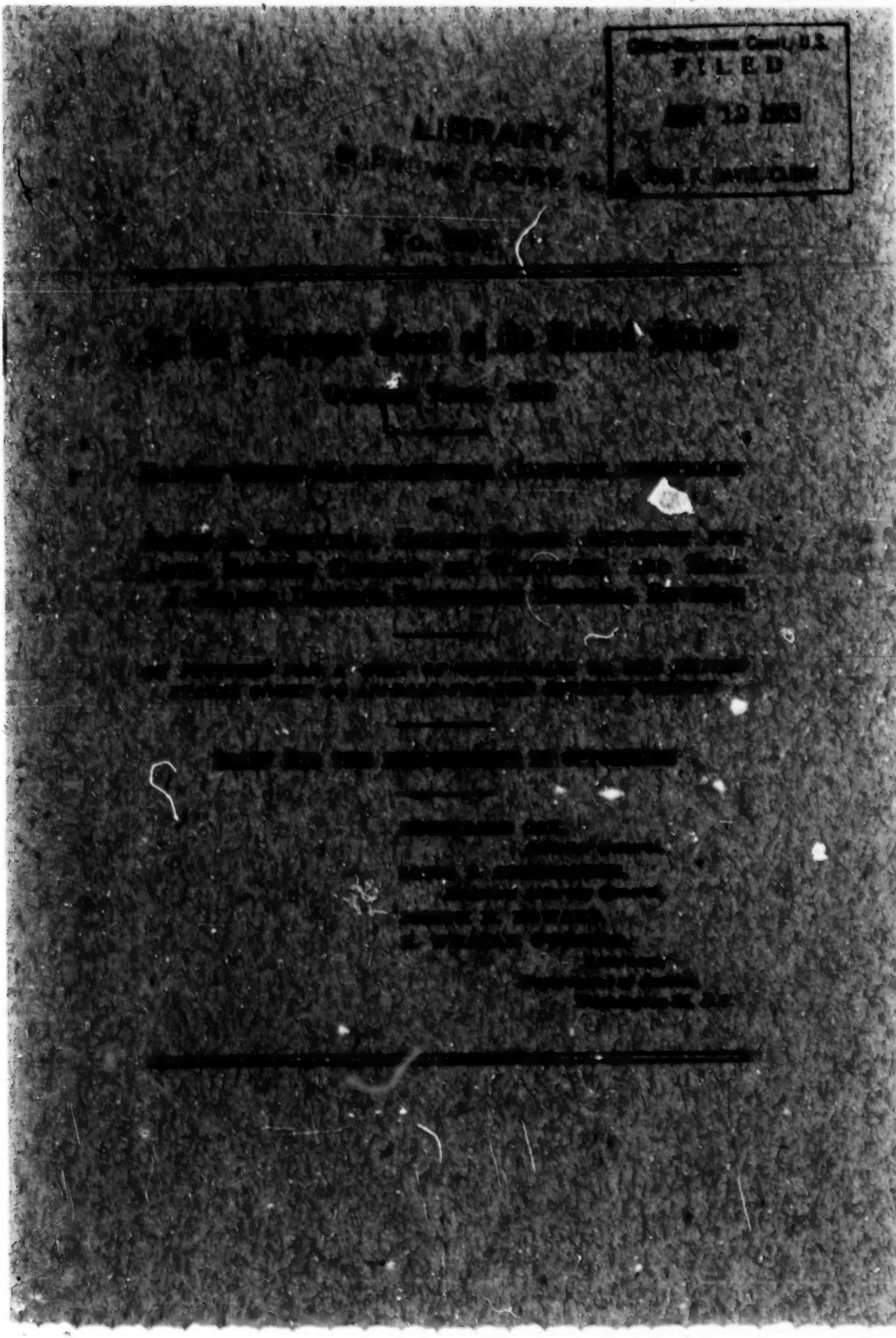

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 821

BADGER METER MANUFACTURING COMPANY, PETITIONER

v.

JAMES B. BRENNAN, UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF WISCONSIN, AND EMIL J. NELSON, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the district court (Pet. App. 5–21) and the order of the court of appeals (Pet. App. 26) have not been reported.

JURISDICTION

The order of the Court of Appeals was entered on November 29, 1962 (Pet. App. 26). The petition for a writ of certiorari was filed on February 12, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the order denying the motion to suppress and return copies of books and records, which petitioner alleges were obtained illegally from it, was appealable as a final order in an independent proceeding after the original documents had been returned.

STATEMENT

Petitioner, Badger Meter Manufacturing Company, sells water meters to various municipalities. Early in 1954 the Internal Revenue Service received reliable information that petitioner had a policy of "kicking back" ten percent of the sales price to municipal officials; that Philip J. Berner, secretary-treasurer of petitioner, was carrying out the policy under the guise of advancing expenses to salesmen; and that there had probably been criminal tax violations by petitioner for the years 1949 to 1951. Further information indicated that petitioner had kept records of the kickbacks. Late in June 1954 Revenue Agent Graf was sent to petitioner's office where he asked permission to examine the books in order to audit the corporation's 1951 return. On July 6, after he had spent about ten days in the office working on the books, he returned, accompanied by Special Agent Stieber who identified himself as a special agent, and stated that he had information about kickbacks. Both agents were allowed to continue the examination, making transcripts and abstracts from some of the books. They uncovered a lead which brought them to information that the kickbacks were recorded in a "black

book" kept in Berner's office. On July 27 Special Agent Stieber asked Berner for certain specific corporate files, and at the same time he informed the corporation's counsel that a criminal investigation was in progress. The files requested were produced. On August 6 the agents asked Berner for the "black book," but Berner said that he would not make a decision on this request until August 16 or 17 (Pet. App. 6–10; R. 16–17).

On October 11 an Internal Revenue summons was issued to Berner, directing him to testify concerning petitioner's tax liabilities, and to produce the corporate ledger recording the kickback payments (R. 18, 21, 23). When Berner was asked for the ledger, his counsel answered that there was no corporate ledger containing the kickback records; that Berner would neither admit nor deny possession of a private ledger of the sort described in the summons; and that he would claim his privilege against self-incrimination if the summons required production of private records (R. 20–21, 23–24). Berner approved this statement by counsel. On February 3, 1955, the government instituted a proceeding in the district court for an order requiring Berner to obey the summons (R. 26–30). The action was held in abeyance for some time by agreement, but on March 4, 1955, Berner produced without objection the two black ledgers (R. 31–32). This material was photostated by the agents, and the originals were then returned to Berner (Pet. App. 10–12, 20, 29; R. 413).

On June 8, 1959, a complaint was filed with the United States Commissioner for the Eastern District of Wisconsin charging Berner with a wilful attempt to evade the taxes of petitioner for the year 1952 (R. 36–38). On August 5, 1959, an indictment was returned against Berner in the same district, charging him with having falsely stated to the revenue agents that petitioner had no corporate record of the kickback payments whereas he well knew that there was such a record (Pet. App. 13).

On June 23, 1959, fifteen days after the institution of the complaint against Berner, petitioner filed a "Petition and Motion for the Return of Seized Property and the Suppression of Evidence" (R. 2, 3). Petitioner alleged that the Internal Revenue Service, although engaged from the outset in a criminal investigation of its income tax returns, obtained access to its books under the pretense of making a routine audit of the returns for the years 1951 and 1952; that the revenue agents made copies of some records, took excerpts from others, and made notes, memoranda, and computations based upon this inspection of the books; that they made copies of the two black ledgers produced by Berner; and that they obtained much secondary evidence as a result of their inspection of the books (R. 6–12). Petitioner claimed that the constitutional rights of Berner and itself had been violated by the agents' actions, and that there was danger that the evidence so obtained would be used in some criminal proceedings against petitioner itself, or against one or more of its officials, particularly Berner

(R. 6, 8, 11–15). Petitioner did not allege that the two black ledgers belonged to it[1] and there was no allegation that the agents had retained any of petitioner's original records.

The prayer for relief asked for the return of original advance and expense checks (Pet. App. 2; R. 4), but there was no allegation that the originals are still in the possession of officers of the United States, and we have been assured by the United States Attorney that all original checks have been returned. The prayer for relief also asked for the return of the originals of the two black ledgers (Pet. App. 3; R. 4), but it is clear from the record that these were returned to Berner very shortly after he produced them in response to the summons (Pet. App. 12; R. 412). The prayer for relief further asked that all copies of the books and ledgers, and all evidence obtained as a result of the agents' examination of the books and ledgers, be returned to petitioner and be suppressed in any criminal proceeding against petitioner, Berner, or any other corporate official (Pet. App. 1–3; R. 3–5).

A few days later Berner filed a similar motion to suppress evidence, alleging that his constitutional rights had been violated by the manner in which the agents obtained the evidence and asking that the respondents be restrained from using it against him in any criminal proceeding (Pet. App. 14). He also

[1] The allegation as to the ledgers was that they "are the property of the petitioner if [the government should succeed in proving] that they were corporate records and not personal records of Berner's * * *" (R. 6).

alleged that the two black ledgers were his personal property.[2]

A consolidated hearing was held on the two motions (Pet. App. 5–6; R. 90–389). It was clear that both petitioner and Berner were seeking the suppression or return, not of original records, but of the copies, excerpts, and memoranda made by the agents during the course of their investigation (R. 71, 172–175, 200, 204, 412, 413). After a careful review of the evidence (Pet. App. 6–14), the district court concluded that petitioner had freely consented to the examination of its books, and that this consent was not vitiated by the failure of the agents to announce at the outset that they were conducting a criminal investigation[3] (Pet. App. 15–18). The motions to suppress were both denied (Pet. App. 21, 24–25). On November 29, 1962, petitioner's appeal was dismissed by the Court of Appeals for the Seventh Circuit on the ground that the order of the district court was interlocutory and non-appealable (Pet. App. 26).

The complaint against Berner for a wilful attempt to evade the taxes of petitioner was dismissed by the district court on June 9, 1961 (Pet. App. 13). On

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[2] Paragraph 30 of Berner's motion reads, in part, as follows: "The records described in Exhibit F [see R. 412], and delivered to Special Agent Steiber * * * were personal and private papers and records of the petitioner * * *."

[3] The district court found it unnecessary and impossible to determine whether the two black ledgers belonged to petitioner or to Berner (Pet. App. 21). Petitioner now urges (Pet. 2) that Berner agreed that the ledgers belonged to petitioner. However, the so-called agreement (Pet. App. 22–23) states that it was made only for the purposes of argument on the motions to suppress, and that Berner reserved the right to present evidence of his ownership of the ledgers in any future proceeding.

October 12, 1962, and on December 10, 1962, the district court entered orders dismissing the two counts of the false statement indictment against Berner which had been pending since August 1959. The United States noted appeals from both orders, but these were dismissed by stipulation in the latter part of February 1963.

ARGUMENT

1. Petitioner argues that, since no criminal action was ever begun against it, its motion to return and suppress evidence was an independent civil action, and that the order denying relief was final and appealable. The petition suggests (Pet. 3, 4, 6) that the respondent officials of the United States still retain some corporate records. If they did, petitioner's action could be treated as a separate and independent suit to recover property, rather than as part of a criminal case, since no criminal case has yet been started against petitioner. The decision by the district court of an independent action would have been final and therefore appealable by the losing party, whether the government or petitioner. See *DiBella* v. *United States,* 369 U.S. 121. However, the fact is that the government returned all of the original records.

The issue in this case on the merits is whether petitioner was entitled to the return of copies of its records which were made by the government and the suppression of evidence. Even though no criminal case has ever been brought against petitioner itself, the sole reason for petitioner's motion for the return of copies and the suppression of evidence is anticipation of a future criminal or civil case against itself

or its officers. Petitioner has no property interest in the copies; indeed, the copies were made by the government and do not even belong to petitioner. As petitioner admits (Pet. 9), the test of whether a proceeding is independent and therefore appealable is essentially practical and pragmatic. See *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 306; *DiBella* v. *United States, supra,* 369 U.S. at 124, 129; *Carroll* v. *United States,* 354 U.S. 394, 404, note 17; *Cogen* v. *United States,* 278 U.S. 221, 225. Applying these standards here there is no reason for considering petitioner's motion as independent of any possible future proceedings.

Petitioner contends (Pet. 3, 5, 8) that, if tax deficiencies are assessed by the government against it, it will be unable to challenge the government's use of the evidence involved here in a later tax proceeding. Therefore, petitioner states, its only opportunity to challenge the government's taking of the evidence is by appeal in this case. The government submits, however, that petitioner is free to raise the same objections to the government's use of the evidence in any future civil or criminal proceeding. It is well established that only final orders may be relied upon as *res judicata. Merriam* v. *Saalfield,* 241 U.S. 22, 28; *Smith* v. *McCool,* 16 Wall. 560, 561; *United States* v. *Davis,* 3 F. Supp. 97, 98 (S.D. N.Y.) Thus, the only benefit to petitioner of allowing it to appeal the denial of its motion at this time is to obtain an immediate appellate ruling. But such a ruling may be a complete

waste of judicial time and effort if the government never brings a civil or criminal proceeding against petitioner.

2. In any event, there is no basis for petitioner's argument on the merits. Petitioner's sole contention (Pet. 8; Pet. App. 28–32) is that the examination by the revenue agents of the corporate records was illegal because they did not state the criminal nature of the investigation at the outset. The courts of appeals have unanimously held to the contrary. *Scanlon* v. *United States,* 223 F. 2d 382, 385 (C.A. 1); *United States* v. *Sclafani,* 265 F. 2d 408, 414–415 (C.A. 2), certiorari denied, 360 U.S. 918; *Grant* v. *United States,* 282 F. 2d 165, 170, 291 F. 2d 227 (C.A. 2), reversed with instructions to dismiss the appeal, 369 U.S. 401; *Russo* v. *United States,* 241 F. 2d 285 (C.A. 2), certiorari denied, 355 U.S. 816; *United States* v. *Frank,* 245 F. 2d 284, 285–286 (C.A. 3), certiorari denied, 355 U.S. 819; *Turner* v. *United States,* 222 F. 2d 926, 930–932 (C.A. 4), certiorari denied, 350 U.S. 831; *Lisansky* v. *United States,* 31 F. 2d 846, 851 (C.A. 4), certiorari denied, 279 U.S. 873; *Montgomery* v. *United States,* 203 F. 2d 887, 892–893 (C.A. 5); *United States* v. *Achilli,* 234 F. 2d 797, 805 (C.A. 7), affirmed on other grounds, 353 U.S. 373; *Hanson* v. *United States,* 186 F. 2d 61, 64–66 (C.A. 8). See also *Wilson* v. *United States,* 162 U.S. 613, 621–624; *Powers* v. *United States,* 223 U.S. 303, 312–314.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1963.

PETITIONER'S REPLY BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 821

BADGER METER MANUFACTURING COMPANY,

Petitioner;

v.

JAMES B. BRENNAN, in his capacity as United States Attorney for the Eastern District of Wisconsin; and EMIL J. NELSON, in his capacity as District Director of Internal Revenue,

Respondents.

PETITIONER'S REPLY TO THE BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Respondents.

PETITIONER'S REPLY TO THE BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

Neither opinion below is reported. The opinion of the district court is Appendix B, pp. 5-21; and the opinion of the court of appeals, dismissing the "order" of the district court as "interlocutory and not an appealable order under the doctrine and principles of *DiBella v. United States*, 369 U.S. 121", is Appendix E, p. 26.

ARGUMENT
(ADDRESSED TO RESPONDENTS' ARGUMENT)

RESPONDENTS' FIRST ARGUMENT IS THAT ALTHOUGH A CITIZEN MAY SUE FOR AND RECOVER ORIGINAL RECORDS ILLEGALLY-SEIZED BY GOVERNMENT OFFICERS, HE MAY NOT RECOVER COPIES OF THE RECORDS MADE BY THE SAME OFFICERS

Respondents Admit That If They Possessed The Original Records, The Company's Action Would Have Been A Separate, Independent, Civil Action And The District Court's Judgment Would Have Been Appealable

Respondents admit three times, on page 7 of their brief, that no criminal case has ever been instituted against the Company. The district court found that no criminal investigation was ever directed against the Company. (App. B, pp. 8, 10, 11, 18, 19; R. 67, 69, 70, 76, 77).

Therefore, in the first paragraph of the respondents' Argument, they concede that if they possessed the originals of the seized Company records (as differentiated from copies of the originals which the government has made and retains), the Company's action to recover the originals would have been a separate, independent action to recover its property, and the district court's judgment would have been final and appealable. (Resp. Brief, p. 7).

Respondents agree that *DiBella v. United States, supra,* 369 U.S. 121, would not apply, if they possessed the original records. (Resp. Brief, p. 7).

But, the respondents contend, "Petitioner has no property interest in the copies; indeed, the copies were made

by the government and do not even belong to petitioner." (Resp. Brief, p. 8). More exactly, the copies were made by the same Special Agent who spearheaded the unlawful search and seizure. (App. B, pp. 9, 12; R. 68, 71).

Copies Of Unlawfully-Seized Records Are No More To Be Retained By Those Who Seized The Originals, Than The Originals Are To Be Retained

There is no substance whatever to the respondents' contention that although the Company had the right to bring a civil action for and recover its illegally-seized original records, the Company was not and is not entitled to the copies of those records made by the officer who seized the originals.

The respondents point to no authority in support of their contention.

Copies of records illegally seized are just as tainted and just as much to be returned, as are the originals of those records. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385. If this were not true, the result would be the result which Mr. Justice Holmes, speaking for the Court in *Silverthorne*, described as follows (251 U.S. 391):

> "The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had."

If the respondents were permitted to retain copies of illegally-seized records, made by the very officer who seized the originals (App. B, pp. 9, 12; R. 68, 71), when they so clearly are part of the "fruit of the poisonous tree", the constitutional and other legal rights for which the

Company is contending would become mere forms of words. See, e.g., *Wong Sun v. United States*, No. 36, this Term, decided January 14, 1963, pp. 13-15 (371 U.S. 471, 484-486 [Prelim. Print]); and *Nardone v. United States*, 308 U.S. 338, 340-41.

HAVING CONCEDED THAT *DI BELLA* DOES NOT APPLY, RESPONDENTS CREATE A STRAW MAN BY REFERRING TO POSSIBLE FUTURE CRIMINAL CASES

Respondents refer, on pages 7, 8 and 9, to the possibility of a "future criminal case" and a "future criminal proceeding" against the Company. But the district court found, and the respondents know, that all future criminal prosecutions for the tax years involved (1953 was the most recent) are time-barred. (App. B, p. 13; R. 72).

RESPONDENTS MISSTATE THE COMPANY'S POSITION AND THE FACTS WITH RESPECT TO THE IMPORTANCE OF THIS CASE IN CONNECTION WITH CIVIL TAX FRAUD CASES

Respondents Misstate The Company's Position

The following statement appears on page 8 of respondents' brief: "Petitioner contends (Pet. 3, 5, 8) that, if tax deficiencies are assessed by the government against it, it will be unable to challenge the government's use of the evidence involved here in a later tax proceeding."

On page 3 of the Company's petition for a writ, under the caption Jurisdiction, the Company stated that the denial by the court of appeals of any right to have reviewed on the merits a trial court's conclusion that a

search and seizure of a citizen's property was lawful, and a trial court's refusal to order a citizen's seized property returned to him, was of special importance for the reason:

> "A decision that such a seizure was unlawful, and the consequent return to a citizen of his seized property, are both of major importance to his ability to defend against the assessment of, *or to recover*, actual penalties founded on the fruits of the unlawful search and seizure by federal officers." [emphasis supplied]

A similar statement, including the phrase "or to recover", together with supporting authorities, was made on pages 8 and 9 of the Company's petition, under the caption Reasons For Granting The Writ.

Respondents Misstate The Facts

Respondents, on page 8 of their brief, imply that no tax deficiencies (much less penalties) have been assessed against the Company, and on page 9 state that "such a [appellate] ruling [at this time] may be a complete waste of judicial time and effort if the government never brings a civil ** proceeding against petitioner."

The facts are that a deficiency, but no penalty, for the year 1951, was assessed, and was paid with interest on August 25, 1955; a deficiency, plus a fifty per cent penalty, for the year 1952, was assessed, and was paid with interest on November 16, 1956; a deficiency, plus a fifty per cent penalty, for 1953, was assessed, and was paid with interest on November 26, 1958; and that claims for refunds of those deficiencies, civil fraud penalties and interest were filed by the Company on approximately August 23, 1957, November 14, 1958, and November 24, 1960, and now are pending.

Notwithstanding the respondents' allegations to the contrary, the government never will need to make an assessment (Cf., Resp. Brief, p. 8), or to bring a civil proceeding against the Company (Cf., Resp. Brief, p. 9). The Company will be compelled to bring an action to recover the penalties.

Finally, respondents argue that there is no point in an appellate ruling at this time on the illegality of the seizures of the Company's property, because "petitioner [the Company] is free to raise the same objection to the government's use of the evidence in any future civil or criminal proceeding." (Resp. Brief, p. 8). In making this argument, respondents disregard the fact that more than nine years already have elapsed since the searches and seizures complained of. And they also disregard the fact that a *voir dire* on a new objection to the receipt in evidence of the seized records might require, as the taking of testimony in this action did, approximately six days. (R. 90-117; 118-389).

Such arguments against the issuance of the writ indicate a disposition, the Company submits, never to permit any appellate court to review the conduct of the Agents, as to which the district court said in its opinion: "Such a holding should in no wise be construed as approval of the methods and tactics here found to have been used [by the Agents]". (App. B, p. 18; R. 76).

But despite all other arguments of the respondents, their concession that the court of appeals erred in dismissing the Company's appeal on the ground of the "doctrine and principles of *DiBella v. United States*, 369 U.S. 121" cannot be evaded. (Resp. Brief, p. 7).

ARGUMENT
(ADDRESSED TO RESPONDENTS' STATEMENT OF THE CASE)

The respondents' Statement in their Brief in Opposition is directed to the merits of the case, rather than to the reasons for granting the writ. (Resp. Brief, pp. 2-7). Therefore, the Company does not encumber this Reply to dispute their version of the merits.

However, we do note two admissions of fact made by the respondents:

First — respondents admit that there is no criminal case, of any kind, pending against Berner. (Resp. Brief, pp. 6, 7).

Second — respondents admit that the Revenue Agents "uncovered a lead which brought them to information that the [alleged] kickbacks were recorded in a 'black book' kept in Berner's office". (Resp. Brief, pp. 2-3). This lead was Mrs. Towle's name and the information she gave the Agents with respect to the ledgers. (App. G, p. 29, first full paragraph).

Also, the respondents' Statement contains two major inaccuracies, which we correct below.

The first inaccuracy exists on page 5 of respondents' brief. There they say as to the copies of the two ledgers which are a portion of the property which the Company seeks to have returned to it: "Petitioner [the Company] did not allege [in its petition to the district court] that the two black ledgers belong to it'"; and they append the following footnote:

> "'The allegation as to the ledgers was that they 'are the property of the petitioner if [*the government should succeed in proving*] that they were corporate

records and not personal records of Berner's * * *' (R. 6)." [emphasis supplied]

The actual allegation in the Company's petition to the district court was:

> "(a) * * *; and the ledgers referred to in subparagraphs (III) and (IV) above were and are the property of the petitioner if, as the respondents have and do contend in attempted justification of their coercing Berner to produce the ledgers, that they were corporate records and not personal records of Berner's; and" (R. 6).

Subparagraph (III) referred to in the Company's allegation quoted above is the subparagraph of the Company's prayer for relief in which the Company specifically asked for the return to it of "all copies of two books (hereinafter called the 'ledgers')," which were described with extreme particularity. (App. A, p. 2; R. 4).

Respondents also misquote the Record in respect of the Company's ownership of the ledgers. In note 3 on page 6 of respondents' brief, they state:

> "Petitioner now urges (Pet. 2) that Berner agreed that the ledgers belonged to petitioner. However, the so-called agreement (Pet. App. 22-23) states that it was made *only for the purposes of argument* on the motions to suppress, * * *." [emphasis supplied]

The fact is that Berner's attorney agreed, and stated in a preliminary brief to the district court, that *"for the purposes of the hearing and decision* on this pre-indictment motion to suppress, the Court may assume that the records in question were corporate records." [emphasis supplied] (App. C., pp. 22, 23; R. 88, 89). That agreement and statement by Berner's counsel constituted evidence before the district court at the consolidated trial

of the Company's and Berner's cases. *Oscanyan v. Arms Co.*, 103 U.S. 261, 263.

CONCLUSION

The petitioner Company respectfully submits that the concessions and admissions in the respondents' brief establish that the writ of certiorari ought to issue to the United States Court of Appeals for the Seventh Circuit, the judgment of said court ought to be vacated, and the case ought to be remanded to said court for review on the merits; or, in lieu of such remand and review, that this Court ought to grant to petitioner such other and further relief as to this Court, in the exercise of its supervisory powers and discretion, may appear just, equitable and advisable.

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